[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

NRC-2013-0050

RIN 3150-AJ24

Potential Changes to Interlocutory Appeals Process for Adjudicatory Decisions

AGENCY: Nuclear Regulatory Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing this Advance Notice of Proposed Rulemaking (ANPR) to begin the process of potentially amending its regulations to change the interlocutory appeals process for certain adjudicatory decisions. The NRC seeks public comment on these potential changes to the interlocutory appeals process.

DATES: Submit comments by [**INSERT DATE 90 DAYS AFTER PUBLICATION**]. Comments received after this date will be considered if it is practical to do so, but the NRC is only able to ensure consideration of comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this ANPR, which the NRC possesses and is publicly available, by searching on http://www.regulations.gov under Docket ID NRC-2013-0050. You may submit comments by any of the following methods:

- **Federal Rulemaking Web Site:** Go to http://www.regulations.gov and search for Docket ID NRC-2013-0050. Address questions about NRC dockets to Carol Gallagher; telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov.

- **E-mail comments to:** Rulemaking.Comments@nrc.gov. If you do not receive an automatic e-mail reply confirming receipt, then contact us at 301-415-1677.

- **Fax comments to:** Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

- **Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attn: Rulemakings and Adjudications Staff.

- **Hand deliver comments to:** 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern time) Federal workdays; telephone: 301-415-1677.

For additional direction on accessing information and submitting comments, see "Accessing Information and Submitting Comments" in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: James Biggins, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-6305; e-mail: james.biggins@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC-2013-0050 when contacting the NRC about the availability of information for this ANPR. You may access information related to this ANPR, which the NRC possesses and is publicly available, by the following methods:

- **Federal Rulemaking Web Site:** Go to http://www.regulations.gov and search for Docket ID NRC-2013-0050.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may access publicly available documents online in the NRC Library at http://www.nrc.gov/reading-rm/adams.html. To begin the search, select "Begin Web-based

ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail at PDR.Resource@nrc.gov. The ADAMS accession number for each document referenced in this ANPR (if that document is available in ADAMS) is provided the first time that a document is referenced.

- **NRC's PDR:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC-2013-0050 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at http://www.regulations.gov and enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submissions. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Additional Information

The NRC is considering four options pertaining to the interlocutory review of rulings on requests for hearings or petitions to intervene under § 2.311 of Title 10 of the *Code of Federal Regulations* (10 CFR). At the NRC, an interlocutory appeal is a request for the Commission to consider an adjudicatory issue prior to the conclusion of the hearing process before the Atomic Safety and Licensing Board (Licensing Board). The NRC seeks public comments on the four options described in Section B, *Options for Amending the 10 CFR 2.311 Interlocutory Review Provision,* of this document, as well as on its interlocutory appeals rules and process in general.

A. Interlocutory Review Under Current NRC Regulations

The NRC regulations currently provide three avenues for interlocutory review in NRC adjudicatory hearings. First, 10 CFR 2.341(f)(1) provides for interlocutory review of questions certified to the Commission under 10 CFR 2.319(l), or of rulings referred or issues certified to the Commission under 10 CFR 2.323(f). These questions or rulings may be certified to the Commission by the presiding officer in his or her discretion, or on the motion of a party requesting that the presiding officer exercise this discretion. When determining whether to certify such a question or ruling, the presiding officer must find, as a threshold matter that it raises significant and novel legal or policy issues, or the resolution of the issues would materially advance the orderly disposition of the proceeding. Party motions initiating this process must be made no later than 10 days after the occurrence or circumstance from which the motion arises.

Second, 10 CFR 2.341(f)(2) allows a party to directly request interlocutory review of the Commission without referral or certification by the presiding officer. Such a request must be filed within 25 days after the decision or action at issue. The request must contain a summary of the decision or action at issue, a statement that the argument in the request was previously raised before the presiding officer, or why it was not, a statement why the decision or action is erroneous, and a statement why Commission review should be exercised. The Commission

may grant this interlocutory review in its discretion if, the party requesting review demonstrates that the issue threatens the requesting party with immediate and serious irreparable impact, which could not be alleviated through a petition for review of the final decision, or the issue affects the basic structure of the proceeding in a pervasive or unusual manner.

Third, 10 CFR 2.311 provides an opportunity to request interlocutory review for a limited subset of rulings – requests for hearings or petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information or safeguards information. With respect to rulings on requests for hearings or petitions to intervene, the interlocutory appeal must be made within 25 days after the service of the order. The appeal is initiated by filing a notice of appeal and accompanying supporting brief. Unlike the other methods of interlocutory review, these appeals do not require the satisfaction of specific threshold requirements, but they are limited in scope to whether a hearing opportunity should have been granted or wholly denied. Because of this limitation, if at least one of the petitioner's contentions is admitted, meaning that the petitioner has been admitted as a party to the hearing process, then the petitioner may not appeal the denial of any of its other contentions under 10 CFR 2.311; the petitioner may appeal these individual contention admissibility determinations only pursuant to 10 CFR 2.341(f)(1) or (f)(2), or may appeal them pursuant to 10 CFR 2.341(b) after the Licensing Board has issued its final decision. Similarly, parties, such as the license applicant, can immediately appeal the admission of all of the petitioner's admitted contentions under 10 CFR 2.311 on the grounds that *none* of the contentions are admissible, and therefore that there should be no hearing. However, such parties cannot appeal under 10 CFR 2.311 that *some* of the admitted contentions should not have been admitted; the appeal of individual contention admissibility determinations (but fewer than all contentions) may only be made under 10 CFR 2.341(f)(1) or (f)(2) and subject to its threshold requirements. The result of the interlocutory appeal process

under § 2.311 is that the Commission determines whether or not a hearing opportunity should have been granted at all.

In summary, three processes exist for interlocutory review in the current NRC regulations, each with its own threshold requirements: 1) Certified interlocutory reviews allow a party to request that the presiding officer certify an issue to the Commission. The threshold for Commission consideration is that the certified issue must raise significant and novel legal or policy issues, and the resolution of the issues would materially advance the orderly disposition of the proceeding; 2) Direct interlocutory reviews to the Commission under § 2.341(f)(2). The threshold requirement for acceptance of the appeal is that the party must be threatened with immediate and serious irreparable impact, which could not be alleviated through a petition for review of the final decision, or the issue affects the basic structure of the proceeding in a pervasive or unusual manner; and 3) Interlocutory review under § 2.311 that has no threshold requirements. However, the scope of such a review, with respect to requests for hearings or petitions to intervene, is limited to whether there is standing and at least one admissible contention so that the petitioner should be granted a hearing and made a party to a proceeding. Interlocutory review under 10 CFR 2.311 is not available regarding whether specific contentions should have been admitted or denied, but only regarding whether at least one contention should have been admitted or all contentions denied and, thus, admission to a hearing proceeding should be granted or denied.

B. Options for Amending the 10 CFR 2.311 Interlocutory Review Provision

The NRC is considering four options with respect to the interlocutory review of rulings on requests for hearings or petitions to intervene: 1) Retaining the current rule without any change (status quo), which permits interlocutory appeals, without any threshold requirements, of rulings on requests for hearings or petitions to intervene regarding only whether the hearing or intervention should be granted or denied in its entirety; 2) Increasing the scope of 10 CFR 2.311

beyond just whether the hearing or intervention should be granted or denied in its entirety to encompass the interlocutory review of each individual contention admissibility determination. All appeals would have to be made immediately following the issuance of the ruling by the presiding officer; 3) Increasing the scope of 10 CFR 2.311 to encompass the interlocutory review of each individual contention admissibility determination, except for the admission or denial of contentions grounded in the National Environmental Policy Act of 1969, as amended (NEPA). For decisions on environmental contentions partially admitting or partially denying a request or petition, the appeal of which would only be entertained either a) after the issuance of a final Environmental Impact Statement (or other NEPA document) or, alternatively, b) after a final decision in the proceeding (non-interlocutory); and 4) Reducing the scope of 10 CFR 2.311 to include only interlocutory review of whether a request for hearing or petition to intervene was properly denied in its entirety. Orders granting a hearing, but only admitting some contentions would not be immediately appealable by any party. In addition to these options, the NRC seeks comment on clarifying the interlocutory review process.

Option 1

Option 1 is to retain the status quo. The current language of 10 CFR 2.311 has been in place since 1972 (37 FR 28,710; December 29, 1972). Section 2.311 makes immediately appealable, without threshold requirements, the granting or denial of a request for hearing or petition to intervene, but not the granting or denial of individual contentions. Therefore, a party whose request or petition has been granted by a finding of standing and the admission of at least one contention is not allowed to immediately appeal the order denying its other contentions under 10 CFR 2.311. Conversely, a party in opposition to the granted request or petition may argue on immediate appeal under 10 CFR 2.311 only that none of the contentions should have been admitted and thus, the request or petition should have been wholly denied; it cannot argue that only some of the admitted contentions should not have been admitted.

Interlocutory appeals of individual contention admissibility determinations not necessary for the granting or denial of a request or petition must be made according to the interlocutory review requirements of 10 CFR 2.341(f)(1) or (f)(2), respectively, or await the final decision of the Licensing Board on the admitted contentions. Unlike 10 CFR 2.311, these interlocutory review processes have specific threshold requirements.

The arguable advantage of the current limited scope of 10 CFR 2.311 is that it provides for immediate appeal, without threshold requirements, of the most crucial determination, which is whether a party is admitted to a proceeding, but imposes the threshold requirements for other interlocutory appeals on individual contention admissibility determinations that do not affect whether the party is admitted to the proceeding. Applying threshold requirements to these individual contention admissibility determinations may save the Commission from attending to matters that, by the end of the proceeding, prove to no longer be an issue. One disadvantage of the current rule is that if a petitioner appeals its denied contentions under § 2.341(b) after the Licensing Board concludes the hearing process, the Commission could grant the appeal and remand the proceeding to the Licensing Board to consider a contention that was originally denied. This scenario re-starts the hearing process for the remanded issue and extends the length of the proceeding. Another arguable disadvantage of 10 CFR 2.311 as currently written is that it may encourage parties opposing the request or petition to appeal admission of all contentions, regardless of merit, in order to preserve their right to appeal individual contention admissibility determinations under the advantageous no-threshold standard of 10 CFR 2.311. Conversely, it may prevent individual contentions, which should not have been admitted, to proceed in the hearing process, thereby using hearing resources unnecessarily.

Questions on Option 1

1. Does the current language of 10 CFR 2.311 strike a fair balance between allowing, without threshold requirements, the early resolution of contention admissibility determinations and preserving resources by deferring appellate review of issues?

2. Is it fair that the standard focuses on whether or not a hearing should be granted which results in an opposing party's ability to appeal the admission of all admitted contentions whereas the petitioner's ability to appeal is limited to the denial of all of its contentions?

3. Will Option 1 result in time and resource savings to the parties compared to the other options? Consider whether there are time and resource savings resulting from entertaining only some 10 CFR 2.311 appeals of contention admissibility determinations compared to the risk that the failure to resolve all contention admissibility determinations early in the proceeding will result in the Commission later finding a contention admissible and remanding the issue to the Licensing Board or later finding a contention inadmissible and invalidating the adjudication of a contention.

Option 2

Option 2 is to consider amending 10 CFR 2.311(c) and (d) to allow any petitioner or party to appeal an order granting or denying in whole or in part a request for hearing or petition to intervene within 25 days of the presiding officer's issuance of the order. This amendment would effectively allow all petitioners and parties to immediately appeal, without threshold requirements, rulings on the admissibility of any particular contention (including new or amended contentions filed after the deadline in 10 CFR 2.309(b)). This would be the only opportunity to challenge the ruling. If a petitioner or party failed to challenge the presiding officer's ruling within that 25-day time period, it would not be able to challenge the contention admissibility decision at the end of the proceeding.

The arguable advantage of amending 10 CFR 2.311 in this manner is that it would allow for the early resolution of all contention admissibility determinations. This amendment would

eliminate the possibility that, after a Licensing Board has issued its final order in a proceeding, the Commission, on appeal, will remand the proceeding to the Licensing Board for consideration of a previously denied contention that should have been admitted or that the Commission will find an admitted contention to be inadmissible and invalidate the adjudication of the contention in the proceeding. Additionally, since a party other than the petitioner could appeal the admission of individual petitioner contentions instead of the admission of all petitioner contentions, that party may no longer be incentivized to oppose all admitted contentions, including those individual contentions that it may not otherwise oppose, in order to preserve its right to appeal the admission of those individual contentions that it does indeed oppose. The argument against this approach is that the advantages of early resolution of contention admissibility determinations may be outweighed by the increased adjudicatory workload resulting from the ability of all parties to immediately appeal all contention admissibility determinations without threshold requirements. Additionally, this option would require the petitioners and other parties to devote their attention to matters that, under the current rules, the petitioners and parties would not have been asked to address because, in many cases, at the end of a proceeding, parties choose not to appeal decisions denying the admissibility of contentions or a settlement agreement may have obviated the need to address the admissibility question. Licensing Boards and parties may be hesitant to proceed with the hearing process while contention admissibility is being reviewed by the Commission. Currently, the Commission only periodically receives appeals of the denial of contentions following issuance of Licensing Boards' orders at the end of the hearing process. Option 2 could result in significant workload increases for the Commission if all contentions are likely to be appealed in each case.

Questions on Option 2

1. Will the time and resource savings resulting from conducting a proceeding only after interlocutory appellate review of the admissibility of the contentions outweigh the time and

resources that must be devoted to this appellate review by the parties, Licensing Board, and the Commission?

2. Will this change likely result in the immediate appeal of contention admissibility in most or all cases? Consider whether there would be any incentive for parties to not automatically challenge all Licensing Board orders from either perspective of admitting or denying contentions.

3. Would the likely increase in the quantity of appeals result in a commensurate improvement in the efficiency of the adjudicatory process?

4. Will the availability of a no-threshold appeal for all contention admissibility determinations incentivize petitioners and parties to appeal each contention admissibility determination regardless of merit?

Option 3

Option 3 is to amend 10 CFR 2.311(c) and (d) to allow any petitioner or party to appeal an order granting or denying in whole or in part a request for hearing or petition to intervene within 25 days of the presiding officer's issuance of the order with the exception that, when a request or petition is granted in part, the admission or denial of individual environmental contentions cannot be appealed until a) after the issuance of a final Environmental Impact Statement or, alternatively, until b) after issuance of the Licensing Board's decision at the end of the hearing process. This alternative would effectively allow all petitioners and parties to immediately appeal, without threshold requirements, rulings on the admissibility of any particular contention (including new or amended contentions filed after the deadline in § 2.309(b)), except for the denial or admission of environmental contentions when a request or petition is granted in part.

The arguable advantages and disadvantages of amending 10 CFR 2.311 to include all contention admissibility determinations under alternative b), are the same as discussed under

Option 2. The arguable advantage of specifically excluding the denial or admission of environmental contentions from 10 CFR 2.311 interlocutory review when a request or petition is granted in part is to better align the timing of the review of environmental contentions with the requirements of NEPA. Unlike other contentions, which have to do with the application's satisfaction of NRC regulatory requirements, environmental contentions are concerned with the NRC staff's performance of environmental reviews related to major federal actions as required by NEPA. Generally, when contention admissibility is first determined in a proceeding, these NRC environmental review documents are not yet available. Therefore, at that time, environmental contention admissibility is determined based on an applicant's environmental report. If a request or petition were granted, but one or more of the requestor or petitioner environmental contentions were denied, an immediate appeal of the environmental contentions could potentially become obviated later in time as the content of the NRC staff's environmental document is drafted. For example, the NRC staff's environmental review document could fully address an issue raised by the admitted environmental contention. Thus, a number of unnecessary interlocutory appeals, and their associated resource and time commitments, may be avoided by excluding interlocutory appeals of individual environmental contentions from 10 CFR 2.311 and waiting until after the issuance of the staff's environmental document. The arguable disadvantages of this timing scheme are that contentions which should have been denied continue in the process until the staff's environmental document is issued, or that denied contentions are later admitted by the Commission after the staff's environmental document has been prepared and issued, thus requiring additional staff review outside of the initial process. Additionally, discerning between environmental and non-environmental contentions would become an extra step in the review process.

Questions on Option 3

1. Should contentions grounded in NEPA and related environmental statutes be treated differently than contentions grounded in the Atomic Energy Act of 1954, as amended (AEA), or other requirements, considering that NEPA and the AEA have different requirements?

2. Would petitioners or other parties be prejudiced by treating environmental contentions differently than other contentions?

3. Will the time and resource savings potentially resulting from advancing the appeal of individual contentions, other than environmental contentions, result in efficiencies to the hearing process?

Option 4

Option 4 is to amend 10 CFR 2.311 to only allow for the interlocutory review, without threshold requirements, of a complete denial of a request for a hearing or petition to intervene. Neither the order admitting all contentions, nor the order admitting some and denying some individual contentions would be appealable under 10 CFR 2.311 under this option. These issues would only be immediately appealable according to the interlocutory appeals processes of 10 CFR 2.341(f)(1) or (f)(2), subject to their threshold requirements, or appealable upon the initial decision of the Licensing Board according to the appeals process of 10 CFR 2.341(b).

The arguable advantage of this change is that it would remove the perceived incentive under the current rule for a party to appeal every granted contention, regardless of merit. This option would likely reduce the number of interlocutory appeals, and the resulting expenditure of time and resources to pursue those appeals. The apparent disadvantage would be the removal of the early determination as to the proper admission of some contentions. As previously discussed, without some immediate appellate review of the admission of contentions, the parties may expend significant time and resources only to later have the Commission find the contention to be inadmissible and invalidate the proceeding as it relates to consideration of those contentions. Additionally, this change would allow petitioners to appeal denials of

requests and hearings under the no-threshold standard of 10 CFR 2.311, whereas other parties would have to appeal the granting of these requests or hearings under the standards of 10 CFR 2.341, all of which have threshold requirements that must be satisfied.

Questions on Option 4

1. Will the inability to immediately appeal, without threshold requirements, rulings other than complete denials of hearing requests or petitions result in the unnecessary expenditure of time and resources dedicated to resolving a contention that is later determined by the Commission to be inadmissible?

2. Because this option limits interlocutory appeals to situations where a petition is wholly denied, will it result in saved resources from reduced interlocutory appeals, or will it result in those appeals simply being deferred to the final Licensing Board decision, at which time the appeals will be filed?

3. Are the potentially saved resources from limiting interlocutory appeals under this option balanced by the resources potentially spent on adjudicating contentions that should have been denied?

4. Is it fair under this interlocutory appeal option to allow petitioners to appeal a complete denial with no threshold requirements, whereas other parties must appeal pursuant to § 2.341, which has threshold requirements?

Question on Clarifying the Interlocutory Review Process

In examining any of the potential options there is an additional question on which the agency invites comments. This question relates to a potential clarifying reorganization of the interlocutory appeal provisions rather than to change the substance of those requirements.

1. Currently, the authority to seek interlocutory appeal and the filing requirements to file an appeal are covered in several different sections of the regulations including 10 CFR 2.311,

2.323, and 2.341. Should the provisions governing interlocutory appeals be separate or consolidated in one section in order to provide clarity and consistency?

Dated at Rockville, Maryland, this 27th day of March, 2013.

For the Nuclear Regulatory Commission.

Margaret M. Doane
General Counsel

[FR Doc. 2013-07960 Filed 04/04/2013 at 8:45 am;
Publication Date: 04/05/2013]